

NOT FOR PUBLICATION IN WEST'S BANKRUPTCY REPORTER:

In re David, Case No. 04-00166

Decided: September 8, 2004.

Decision re Trustee's Objection to the Debtor's Exemptions

In re)
)
ERIC LAFAYETTE DAVID, JR.,) Case No. 04-166
) (Chapter 7)
Debtor.)

Under consideration is the trustee's objection to the debtor's amended exemptions filed on June 7, 2004 (Docket Entry ("DE") No. 37).¹ For the following reasons, the court will sustain the trustee's objection.

¹ The objection was briefed when the trustee objected to prior versions of the claimed exemptions. The trustee objected (DE No. 15, filed March 26, 2004) to the debtor's original exemptions dated February 3, 2004. The debtor, David, filed a response (DE No. 18) to the trustee's objection on April 9, 2004, and amended his schedules (DE No. 17) on the same day. The trustee then filed an objection (DE No. 23, filed April 29, 2004) to David's amended exemptions, to which David responded on May 17, 2004 (DE No. 27). David amended his exemptions again (DE No. 26 filed May 27, 2004), and the trustee filed the objection (DE No. 37) addressed by this decision. Although the debtor has not responded to this newest objection, that objection merely noted that the amendment mooted one of the trustee's objections, and renewed the trustee's prior objection (to which the debtor did respond).

U.S.C. § 522(d)(11) and the trustee objected on several grounds.

The trustee's primary objection was that David did not specify under which subsection of 11 U.S.C. § 522(d)(11) he was claiming the exemption.² David amended his schedules to exempt proceeds of the lawsuit in the amount of \$17,425 under 11 U.S.C. § 522(d)(11)(D). Section 522(d)(11)(D) provides, in pertinent part, that a debtor may exempt "[t]he debtor's right to receive, or property that is traceable, to . . . a payment, not to exceed \$17,425, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor" The debtor exempts the remaining \$4,982,575 under 11 U.S.C. § 522(d)(11)(E), (d)(10)(C), and (d)(5). Exemptions claimed pursuant to these provisions are limited to certain types of awards, including "disability, illness, or unemployment benefits" (§ 522(d)(10)(C)); "payment in compensation of loss of future earnings, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor" (§ 522(c)(11)(E)); and the debtor's interest in "any

² The trustee made several other specific objections to David's original exemptions. The trustee objected on the grounds that, to the extent that David seeks a recovery for pain and suffering in the underlying lawsuit, pain and suffering awards may not be exempted under 11 U.S.C. § 522(d)(11)(D). The trustee also indicated that he would not object to an exemption of \$17,425 of the proceeds of the lawsuit under § 522(d)(11)(D), if the damage award was consistent with the exemption allowed by that provision. The trustee fleshed out these objections in more detail in his objection to David's amended exemptions.

property not to exceed in value \$925 plus up to \$8,725 of any unused amount of the [homestead exemption]" (§ 522(d)(5)).

The trustee delineated a number of specific objections to David's exemption of the lawsuit under the foregoing provisions.³ The court will address each of these objections in turn.

A. Exemption of \$17,425 pursuant to § 522(d)(11)(D)

1. Exemptions permitted by § 522(d)(11)(D).

The trustee does not object to David's exemption, pursuant to § 522(d)(11)(D), of \$17,425 of any damages recovered in the lawsuit that are awarded for "personal bodily injury;" however, the trustee objects to the exemption of any award in the lawsuit to the extent that such award is attributable to pain and suffering or pecuniary loss.

Although 11 U.S.C. § 522(d)(11)(D) allows a debtor to exempt payments "on account of personal bodily injury," the statute specifically precludes a debtor from exempting payments on account of "pain and suffering or compensation for actual pecuniary loss." The plain language of the statute does not make clear whether this provision merely precludes the exemption of

³ One of the trustee's objections was that David failed to exempt his Federal Credit Union Account (which was listed as an asset on David's schedules). David amended his schedules (DE No. 26, filed May 17, 2004) to exempt that account, and cured the trustee's objection **as to that issue only**. The trustee filed an objection on June 4, 2004 (DE No. 37) noting that his objection as to the Federal Credit Union Account was resolved, but renewing his other objections.

payments made solely on account of pain and suffering (where the pain and suffering is unaccompanied by any physical injury), or whether it also precludes the exemption of a pain and suffering award that is one component of a personal bodily injury award. Numerous courts have commented on the lack of clarity of § 522(d)(11)(D) and the sparse legislative history of the provision. See, e.g., In re Barner, 239 B.R. 139, 142-43 (Bankr. W.D. Ky. 1999); In re Ciotta, 222 B.R. 626, 630 (Bankr. C.D. Cal. 1998).

Indeed, the legislative history is limited. The history provides:

Paragraph (11) allows the debtor to exempt certain compensation for losses. . . . [S]ubparagraph (D)(11) is designed to cover payments in compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such a loss, such as medical payments, pain and suffering, or loss of earnings. Those items are handled separately by the bill.

H.R. Rep. 95-595, app. pt. 4(d)(i), at 362 (1977), reprinted in 1978 U.S.C.C.A.N. 5693, 6318.

The statute and legislative history make clear that a debtor may not exempt an award made solely on account of pain and suffering, unaccompanied by any physical, bodily loss. This conclusion is supported by a number of courts. See, e.g., In re Scotti, 245 B.R. 17, 20 (Bankr. D.N.J. 2000); Ciotta, 222 B.R. at 632.

It is also possible to conclude from the legislative history

that Congress intended to allow a debtor to exempt only the portion of a personal injury award attributable to physical, bodily injury, while prohibiting the exemption of any attendant award based on pain and suffering, and this is the most natural reading of the statute. I reject those decisions which opine that this could not have been the intent of Congress. See In re Lynn, 13 B.R. 361 (Bankr. W.D. Wis. 1985) (suggesting that without awards for pain and suffering or actual pecuniary loss being exemptible, there is no damage amount for bodily injury that will be exemptible). Assigning a dollar value for the damage arising from a bodily injury, exclusive of compensation for pain and suffering and actual pecuniary loss, may be difficult, but it is not impossible. If one loses his eyes, and damages for pain or suffering or actual pecuniary loss are separately assessed, a jury nevertheless would award damages for the loss alone simply because of the visual pleasures that are lost to the individual, and the greater difficulties the individual experiences in living. Insurance policies often include set dollar amounts for the loss of a limb or eye for this very reason.

However, to expect a debtor who receives a personal injury award readily to distinguish the different components of that award, and exempt only the portion attributable to the actual bodily injury, injects an allocation issue that is made difficult

because the required allocation is often inconsistent with the realities of personal injury awards. Compensation for personal injury may be comprised of a number of awards, including awards for "pain and suffering, bodily injury, loss of a body part, disfigurement, past medical expenses, future medical expenses, past loss of wages, future loss of wages, and loss of consortium." Barner, 239 B.R. at 143 (citations omitted). As the court in Barner noted, this presents difficult issues of proof when a debtor receives a general jury verdict or her compensation is awarded in a lump sum, without any indication of what portion of the award is intended to redress the physical loss, and what portion is intended to redress pain and suffering or future medical expenses. Id. at 142. Nevertheless, these difficulties in allocating a general award between the different components is not a reason to view the statute as creating a useless exemption if pain and suffering (or actual pecuniary loss) accompanying bodily injury are excluded from being exemptible. When the debtor's exemption of such an award is challenged, I conclude that Congress has imposed on the court the task of ascertaining the extent to which such an award is for bodily injury and not for pain and suffering accompanying such bodily injury or compensation for actual pecuniary loss arising from the bodily injury.

In Ciotta, 222 B.R. at 630-32, the court surveyed a number

of the cases interpreting the statute. The court noted that some cases defined "personal bodily injury" broadly to include any physical effects that result from emotional distress. Id. at 631 (citing Levy v. Duclaux, 324 So. 2d 1 (La. Ct. App. 1975) (holding that the plaintiff's humiliation and mental anguish constitute bodily injury)).⁴ Others more narrowly defined "personal bodily injury" to include only permanent bodily injury. Id. (citing In re Marcus, 172 B.R. 502 (Bankr. D. Conn. 1994)).

The court in Ciotta held that an exemption should be permitted where the debtor suffered a cognizable physical injury, regardless of whether such injury was accompanied by pain and suffering. Id. The Barner court agreed specifying that "a debtor may qualify for the exemption if the debtor demonstrates that an actual, cognizable physical injury has been suffered, and 'that the actual injury is substantial enough to reasonably account for the value of the claimed exemption.'" Barner, 239 B.R. at 143 (quoting In re Lester, 141 B.R. 157, 163-64 (S.D. Ohio 1991)).

This court agrees with the holding in Ciotta. If the debtor can demonstrate that the award is attributable to a cognizable physical injury, he should be permitted to exempt that award. Where a debtor receives an award on account of bodily injury that

⁴ The court notes that Levy v. Duclaux is not a bankruptcy case. The court in that case was construing the meaning of "bodily injury" to determine coverage under an insurance policy.

includes a pain and suffering award, the debtor may still exempt the statutorily permitted amount to the extent that the award is attributable to cognizable physical injury; the portion attributable to pain and suffering is not exemptible. In the absence of an allocation in the award, the court is required to make an allocation based on what reasonably could be viewed as the likely sources of the award. Awards based solely on emotional or mental distress, unaccompanied by physical injury, are not exemptible.

The court believes that Barner goes one step too far, however. Although the Barner court held that a debtor must suffer an actual physical injury to qualify for the exemption, the court found that physical manifestations of emotional and mental distress were exemptible bodily injuries. Barner, 239 B.R. at 144-45. The court believes that this stretches the statute too far. The plain language of the statute makes clear that Congress intended to distinguish between physical and mental injury. The legislative history goes further to indicate that Congress intended this provision to allow an exemption for bodily loss. This court does not believe, based on the language of the statute and the legislative history, that Congress intended to include mere physical manifestations of emotional distress in the definition of "bodily injury."

Exemption statutes are to be construed broadly to provide

protection to the debtor. See Caron v. Farmington Nat'l Bank (In re Caron), 82 F.3d 7 (1st Cir. 1996). However, to broaden the definition of "personal bodily injury," as interpreted by the court in Levy (and, to a lesser degree, Barner), to include any physical reaction that the body has to an external stressor, would contradict the distinction Congress clearly intended by limiting the exemption to bodily injury while excluding pain and suffering. On the other hand, to limit the exemption to payments on account of permanent bodily injury would be to read the word "permanent" into the statute, where that word does not appear. Had Congress intended to limit the exemption to permanent injury, it could easily have done so by merely modifying the phrase "personal bodily injury" with the word "permanent." The court does not believe it is appropriate to so limit the debtor's exemption when it is not clear from the statute (or legislative history) that Congress intended to so limit it. The court believes that the construction of the statute provided by the court in Ciotta provides a sound balance and ensures that the debtor has a meaningful exemption, while still adhering to the limitations Congress clearly intended, as evidenced by the statute's plain language and legislative history.

2. David's right to exempt the lawsuit under § 522(d)(11)(D).

Applying the foregoing analysis to the facts of this case poses a difficult problem for the court because the underlying

suit has not yet gone to trial; the court has only the complaint to rely upon in determining whether the debtor suffered "personal bodily injury." Therefore, the court will hold this matter in abeyance and permit the debtor to later demonstrate that any award he receives is exemptible under this provision.

A review of the complaint, however, reveals that the debtor has not yet demonstrated that any portion of the lawsuit is exemptible as a payment on account of personal bodily injury. The debtor is suing Radcliffe Jewelers, Eric Harris (an employee of Radcliffe Jewelers), Baltimore County (because it maintains the Baltimore County Police Department as a government agency), and R.M. Harrison (a Baltimore County Police Officer). The debtor alleges that the defendants unlawfully arrested, seized, strip searched, and prosecuted him. These allegations arise from an incident in which defendant Harris called the police when he suspected David and another person of stealing a ring from Radcliffe Jewelers. Although the police officer, defendant R.M. Harrison, did not find the ring on David after conducting a consensual search of his clothing, Harrison arrested David.

After his arrest, David was strip searched, finger printed, and the police took a mug shot of him. David was charged and prosecuted, but the charges were later dismissed.

In his complaint, the debtor alleges that as a result of the defendant's actions, he suffered a number of "physical and

emotional injuries." However, nowhere in the complaint does the debtor specify any personal bodily injuries that he suffered at the hands of the defendants that are of a character for which damages would be exemptible under § 522(d)(11)(D).⁵

Although it does not appear from the debtor's complaint that he suffered any cognizable bodily injury, at this juncture, where the underlying suit has not yet gone to trial, the court will wait until the debtor's underlying claim is resolved to determine what, if any, portion of the award is exemptible. The trustee merely asks the court to limit the § 522(d)(11)(D) exemption to amounts eventually awarded that do qualify for the exemption. That type of exemption is allowable, and leaves for later adjudication the portion of any eventual award that fits within the exemption. See In re Mercer, 158 B.R. 886 (1993), aff'd sub

⁵ The Statement of Facts portion of the complaint, in describing the injuries the debtor has suffered as a result of the incident, alleges that the debtor suffered "physical nervousness, headaches, inability to concentrate and loss of sleep . . . great humiliation, shame and fright," harm to his reputation, and economic loss. Complaint ¶ 19. See also Complaint ¶ 41. Damages for these type of injuries plainly are not exemptible under § 522(d)(11)(D).

Complaint ¶ 44 alleges that the defendants falsely arrested the debtor and his co-plaintiff because the defendants "did restrict their freedom of travel by use of threats of force and/or bodily harm and actual force and bodily harm." However, ¶ 41 was intended to lay out the injuries the debtor suffered, and ¶ 44 does not add to ¶ 41 because it fails to identify any additional "bodily injury." Infliction of pain alone (as in twisting of an arm without causing the arm to suffer injury) would not give rise to an exemptible damage award under § 522(d)(11)(D).

nom. Mercer v. Monzack, 170 B.R. 759 (D.R.I. 1994), aff'd, 53 F.3d 1 (1st Cir. 1995).

B. Exemption pursuant to § 522(d)(11)(E)

The trustee makes a limited objection to the debtor's exemption of the balance of the \$5,000,000 under § 522(d)(11)(E), which permits a debtor to exempt "a payment in compensation of loss of future earnings of the debtor" The trustee does not object to the exemption of any portion of the lawsuit recovery actually attributable to payment for loss of future earnings. However, the trustee argues that, based on David's scheduled salary, any payment made to compensate David for loss of future earnings could not possibly amount to \$4,982,575.⁶ The trustee further argues that, given the nature of the underlying lawsuit, it is unlikely that any portion of the award would be in compensation for David's loss of future earnings.

As in the case of the bodily injury exemption, where the debtor's lawsuit has not been reduced to a judgment, it is unclear whether the debtor's recovery under the suit will be capable of exemption under this provision. And, because the

⁶ The trustee concedes that damages awarded to replace lost wages at the rate that he indicated he was earning on his statement of financial affairs may be treated as necessary for the support of the debtor and any dependents. However, the trustee does not address an award that is higher than that based on an earning potential not reflected by the statement of financial affairs. That is, the trustee implicitly does not concede that such a higher award would be necessary for the support of the debtor and his dependents.

debtor's exemption, as drafted, would permit the debtor to exempt \$4,982,575 under this provision, the court will sustain the trustee's objection.

As in the case of the § 522(d)(11)(D) exemption, the exemption is restricted to the damages awarded that fit within the language of the exemption provision as "payment in compensation of loss of future earnings of the debtor . . . to the extent reasonably necessary for the support of the debtor and any dependent of the debtor," 11 U.S.C. § 522(d)(11)(E).

C. Exemption pursuant to § 522(d)(10)(C)

The trustee objects to the debtor's exemption of any portion of the lawsuit recovery pursuant to § 522(d)(10)(C), which allows a debtor to exempt her "right to receive . . . a disability, illness, or unemployment benefit" The trustee argues that no portion of the debtor's lawsuit may be exempted under this provision. The court will sustain the trustee's objection to this portion of the debtor's exemptions.

This provision was not intended to permit a debtor to exempt tort actions. Rather, as the legislative history to this provision indicates, "[p]aragraph 10 exempts certain benefits that are akin to future earnings These include . . . disability, illness, or unemployment benefits" H.R. Rep. 95-595, app. pt. 4(d)(i), at 362 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6318.

Other courts have construed this provision to include worker's compensation benefits. See In re Cain, 91 B.R. 182, 183 (Bankr. N.D. Ga. 1988); In re Evans, 29 B.R. 336, 337 (Bankr. D.N.J. 1983). However, in In re Haynes, 146 B.R. 779 (Bankr. S.D. Ill. 1992), the court, construing an Illinois statute identical to § 522(d)(10)(C), held that a debtor was not permitted to exempt the proceeds of a tort award under this provision. In reaching this conclusion, the court examined the legislative history, quoted above, indicating that the exemptions provided under paragraph 10 applied to payments "akin to future earnings," while the legislative history indicated that the exemptions provided under paragraph 11 of § 522 applied to "compensation for losses." See In re Haynes, 146 B.R. at 780 (quoting H.R. Rep. 95-595, app. pt. 4(d)(i), at 362 (1977)).

Section 522(d)(10)(C) permits a debtor to exempt her "right to receive . . . a disability, illness, or unemployment benefit," while § 522(d)(11)(E) allows a debtor to exempt "a payment in compensation of loss of future earnings of the debtor" These are similar provisions and, as the court in Haynes noted, clearly Congress must have intended each subsection to provide a different exemption. See Haynes, 146 B.R. at 781. Turning to the legislative history, it is apparent that exemptions under § 522(d)(10)(C) are limited to **benefits** that are "akin to future earnings," rather than tort awards, which compensate for loss.

See H.R. Rep. 95-595, app. pt. 4(d)(i), at 362 (1977); see also Haynes, 146 B.R. at 781; Evans, 29 B.R. at 338-39.

If any portion of the debtor's lawsuit is exemptible, it is exemptible under paragraph 11 of § 522(d) (the court notes that the debtor has exempted some portions of his lawsuit under this paragraph, as discussed above). However, the lawsuit does not qualify for exemption under the provisions of § 522(d)(10).

D. Exemption under § 522(d)(5)

Finally, the trustee objects to David's exemption of proceeds of the lawsuit pursuant to § 522(d)(5), which provides that a debtor may exempt her interest in "any property not to exceed in value \$925 plus up to \$8,725 of any unused amount of the [homestead exemption]." The trustee objects that because the debtor used \$360 of this exemption, the debtor's exemption should be limited to \$9,290 (the unused value of the exemption).

The court will sustain the trustee's objection. The debtor claims the following property as exempt pursuant to § 522(d)(5): cash (\$10); checking account (\$100); credit union account (\$152); and savings account (\$100). These items total \$362. Therefore, pursuant to § 522(d)(5), the debtor may only exempt the recovery of the lawsuit up to \$9,288.

E. Conclusion

An order follows sustaining the trustee's objection to the debtor's exemptions. If any issue remains after the underlying

lawsuit is resolved, either party may file a motion for a determination of the amounts that fit within the exemptions.

Dated: September 8, 2004.

S. Martin Teel, Jr.
United States Bankruptcy Judge

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